LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUN 10 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of The United States

October Term, 1967

No. 1406

WESTWARD COACH MANUFACTURING COMPANY, INC., and RAY GRAINGER, Trustee in Bankruptcy of Westward Coach Manufacturing Company, Inc.,

Petitioners,

v.

FORD MOTOR COMPANY,

Respondent.

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

JOHN P. PRICE,
515 Circle Tower Building,
Indianapolis, Indiana 46204

Attorney for Petitioners.

ROBERT A. SPRAY,
3675 North Post Road - Suite No. 3,
Indianapolis, Indiana 46226

Of Counsel:

Central Publishing Company, Inc., Indianapolis, Ind.

INDEX

Page

A. THE DOMINANT ISSUE OF CONFUSION-LIKELIHOOD, AND HERE THE NOVEL QUESTION OF PROTECTABILITY AGAINST "REVERSE" CONFUSION, HAVE NOT BEEN ANSWERED OR REFUTED BY RESPONDENT 1

B. RESPONDENT'S SUPPOSED-DEFENSES ... 4

1. Supposed-Defense that the Confused Type of Purchasers are only Prospective, Rather Than Purchase-consumating 4

2. Supposed-Defense that No Case Expressly Asserts That a Valid Trademark Should Be Protected Against "Reverse Confusion" ... 5

3. Ford's Assertion that the Law Will Protect A Trademark Against a Confusing Use Only When the Goodwill-Jeopardy is Coupled with Some Other Unfairness, Such as Diversion of Trade, Specific Fraudulent Intent, or Free-Ride, Etc. 6

4. Ford's Assertion that Prospective Purchasers are Discriminating and Discerning 6

5. Supposed-Defense that Other Names are Jointly Used 7

6. Supposed-Defense that "Mustang" is a Trademark Used by Others 9

Page

7. Supposed-Defense that Indiana Law Has Been Correctly Announced and Applied by the Appellate Court 9

8. Ford's Assertion that White Motor Company Somehow Provides for Ford a Hostage Shield 10

9. Supposed-Defense that Ford Avoids Confusion of Certain Specific Types, Although Not All Types 11

10. Supposed-Defense of Ford's Assertion that Westward's Damage Was Only of a Technical or Non-demonstrable Nature 12

11. Supposed-Defense that Ford's Infringement was not Specifically Stressed in the Bankruptcy Proceedings in 1966 14

12. Supposed-Defense that Westward's Mr. Rizzo Had, During the Continuance of the Ford's Infringement, Sought Co-operation with Ford as a Possible Means to Offset the Harm of the Infringement 16

13. Ford's Assertion that Westward's Inquiry to its Dealers was Biased 16

14. Ford's Assertion that Westward's Federal Registration is To Be Here Ignored 17

C. CONCLUSION 18

CITATIONS

Page

Tisch Hotels v. Americana Inn, 350 F.2d 609, 612, 614 (7th Cir. 1965) 4, 7

Restatement of Torts (Tentative Draft No. 8, April, 1963, Sec. 717, p. 53 ..... 4, 8

IN THE

Supreme Court of The United States

October Term, 1957

No. 1406

WESTWARD COACH MANUFACTURING COMPANY, INC., and RAY GRAINGER, Trustee in Bankruptcy of Westward Coach Manufacturing Company, Inc.,

Petitioners,

v.

FORD MOTOR COMPANY,

Respondent.

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

A.

THE DOMINANT ISSUE OF CONFUSION-LIKELIHOOD, AND HERE THE NOVEL QUESTION OF PROTECTABILITY AGAINST "REVERSE" CONFUSION, HAVE NOT BEEN ANSWERED OR REFUTED BY RESPONDENT:

The arguments presented by the respondent's brief generally avoid the key issue of protectability against "reverse" confusion, which the Appellate Court said was present and which was said by it to be the key issue.

As explained further in our petition for certiorari, this trademark case does *not* basically involve the usual unjust-enrichment aspects of a free-ride diversion of trade to the infringing later-user. Instead, the general confusion basic to this controversy is quite unusually the *"reverse"* ; that is, the widespread public confusion caused by an overwhelming later-use, is that the earlier-user is the affiliate of the later-user, rather than vice versa. (Thus, the description of the confusion as "reverse" is in that sense apt, even though instead of reversing the effect on the earlier-user's goodwill for its own goods, this type of "reverse" confusion extends, rather than reverses, the goodwill-jeopardy of the earlier-user's use.)

And, of record, and as explained in our petition, there is a *very strong* showing here of goodwill-prejudicing confusion, *both likely and actual,* in fact very intense and widespread.

Thus, since the basis of trademark protection is the protection against a goodwill-prejudicing likelihood of confusion, and since that confusion-likelihood has been so strongly shown, *it must necessarily follow that any rationalization by Ford which purports to support a result of non-protectability here must inevitably be based upon errors of reasoning, and upon an avoidance of a recognition that confusion-likelihood is the key and over-riding criterion in a trademark protection dispute.*

Thus, although it may perhaps be playing into Ford's hands to dwell here at all upon Ford's supposed defenses (which do not negate the ultimate determination of confusion-likelihood, and thus *cannot* justify a non-protectability here), we do here point out the main fallacies of the respondent's arguments, lest the Court somehow feel that, if unanswered, they possibly justify an overlooking of the

ultimate fact that the ultimate criteria of confusion-likelihood has been established.

In fact, rather than minimizing the respondent's arguments, we *encourage* the Court to consider respondent's arguments very carefully, much more than just a first-glance impression of them, noting how generally they *evade the main issues.* For when this controversy is seen in its true light (that is, that it involves basically a "reverse-confusion" type rather than a conventional free-ride or customer-diversion-specifically-to-the-later-user type, and with the later-use by Ford being in such a closely-overlapping field, and with both Ford's and Westward's "Mustang" products being overall body-type pleasure vehicles for highway use, rather than of less confusion-creating nature, and with the confusion having been strongly shown to be both likely and actual, and with this case not involving any special defense-favoring factors such as in cases where the earlier user is attempting to achieve effectively a product patent), and recognizing that the strong showing of confusion-likelihood and actuality cannot be negated even if one or more tests do not happen to add to a likelihood of confusion, *all of Ford's supposed-defenses are seen to fail.*

With this in mind, and with apologies to the Court for dwelling upon Ford's supposed-defenses which do not and cannot negate the strong showing of confusion-likelihood which itself mandates that protection be awarded Westward, or at least mandate that summary judgment should be denied to Ford, let us look at Ford's main supposed-defenses, and encourage the Court to look at them in the light of this reply, together with the Court's re-examination of our petition itself, which, in contrast to respondent's brief, sets forth the most relevant issues for this Court's

consideration, and the reasons why certiorari should be granted.

B.

RESPONDENT'S SUPPOSED DEFENSES:

1. Supposed-Defense that the Confused Type of Purchasers are only Prospective, Rather Than Purchase-consumating:

Ford attempts to escape liability by distinguishing between the confusion of Westward's *prospective* purchasers, and the non-confusion of Westward's *purchase-consumating* purchasers at the time of purchasing a Westward product. But this escape attempt is illusory and hollow; for it is the very class of *prospective*-purchasers (in contrast to purchase-consumating purchasers) who are lost to Westward by the affiliation-confusion which leads to loss of Westward's goodwill.

Moreover, quite realistically to the type of harm to be prevented by trademark protection, the general test of liability is quite broader than Ford admits, being broad enough to expressly include *prospective* purchasers. For example, the federal statute attempts to preclude *any* confusion; and even the 7th Circuit expresses it as "any confusion of *prospective* purchasers." *Tisch Hotels v. Americana Inn*, 350 F2d 609, at 612 (7th Cir. 1965). Also, e.g., *Restatement of Torts* (Tentative Draft No. 8, April, 1963, Sec. 717, p. 53.

Ford's view apparently is that a later use is to be condoned merely because the relatively fewer persons who went ahead to consumate a purchase did not remain con-

fused at the time of purchase, regardless of the many prospective purchasers who had been confused and who could never be cultivated into becoming consumating purchasers. This view, even though it would make some sense in the free-ride or other types of cases, is wholly illogical in the situation here present, where it is the mistaken assumption of specifically the *prospective* (in contrast to comsumating) purchasers which cost prospects and sales to Westward.

2. Supposed-Defense that No Case Expressly Asserts That a Valid Trademark Should Be Protected Against "Reverse Confusion":

It is true that we present no case on the precise point of law: protectability against "reverse" confusion. We present no cases; for there appear to be no clear-cut cases which we can find on that precise point, either way.

This is precisely a reason why this Supreme Court should now consider the matter; for, as pointed out in our petition for certiorari, business must not be permitted to think that the monstrous might-makes-right notion is the law of trademarks.

Moreover, although we find no cases precisely on the "reverse confusion" protectability, the protection we seek *does come squarely within* the basic rationale of the protectability standards of the federal statute and all other modern-era articulations: *Protection against likelihood of confusion of prospective purchasers as to any supposed business affiliation which jeopardizes the earlier-user's good will as to its goods.*

3. Ford's Assertion that the Law Will Protect A Trademark Against a Confusing Use Only When the Goodwill-Jeopardy is Coupled with Some Other Unfairness, Such as Diversion of Trade, Specific Fraudulent Intent, or Free-Ride, Etc.:

Through the years, trademark law has developed from its infancy stage of recognizing trademark wrongs only in terms of the unjust enrichment of "palming off," to recognize a basic protection of trademark enforcement is that of protecting against likely confusion which would jeopardize the earlier user's goodwill for his goods. Thus, mere likelihood of confusion is universally declared to be the test of protectability (except in special situations not present here, such as the attempt of the earlier user to attain in effect a product patent via trademark concepts).

And, except in such special case-situations not present here, there is no reason why the goodwill-prejudicing confusion-likelihood thus needs to be coupled with the other unfairnesses, before a trademark will be protected. And, accordingly, trademarks are routinely protected with no mention or requirement of specific harm or unfairness other than likelihood of confusion.

Moreover, the devastating loss of goodwill, in a "reverse confusion" situation as here present, is quite likely to cause considerably *more* harm to the earlier user than the diversion of trade more commonly encountered as a basis for relief in the older trademark cases.

4. Ford's Assertion that Prospective Purchasers are Discriminating and Discerning:

Some prospective purchasers may be of this type; but, considering the fact that the recreational vehicle prospective market includes all persons, many are not discrimi-

nating. And, as even the 7th Circuit recognizes, the law protects the "ignorant, inexperienced, and gullible." *Tisch Hotels v. Americana Inn*, 350 F2d 609 at 614 (7th Cir. 1965).

Moreover, a "discriminating purchaser rule" is, as viewed most favorably to the defense, only one *of several* guides as to the determination of the ultimate issue of likelihood of confusion. It thus cannot un-do that likelihood and actuality of confusion which is established by other factors, such as the close relation of the goods and businesses and marketing channels of products both of which are overall vehicles. And, being just one of several guides, and not itself determinative of non-likelihood of confusion, it is no wonder that the "discriminating purchaser rule" has never been applied to deny protectability where the other guides show that confusion is likely.

And, where *actual* confusion of the allegedly discriminating prospects is shown, as here, that *in itself proves for the earlier-user the ultimate issue of confusion-likelihood.* Thus, if the prospects are to be considered discriminating, *as Ford itself asserts,* the actual confusion shown of them *proves* Westward's right to the protection here sought, *even without other argument.*

5. Supposed-Defense that Other Names are Jointly Used:

The fact that names such as "Century" may be jointly used does not un-do the confusion-likelihood *here* present. Thus the joint usage by others of other names is not even relevant; or, if relevant at all, it goes to show an actual fraudulent intent of Ford in deliberately taking the name because Westward was using it.

Moreover, there is nothing in the record to show why the particular joint usages have been co-existing, to even in part justify Ford, by some parallelism to the situation here. For example: Some of those joint usages may co-exist because innocent equities were built over long years; Some may co-exist by permission; Some may co-exist because each desires some hoped free-ride from the other; Some may relate to the large and relatively immobile "mobile homes" which are not as closely related to sports cars as are the recreational vehicle trailers and campers; Some have been enduring since the era when the products and businesses were not as closely overlapping as has been the trend in the 1960's; Some may be of a type less likely to confusingly carry over onto other products, being in the nature of "model" names such as a Buick "Century" in contrast to "make" names such as many people consider the "Mustang" automobile to be, even though they probably know it is in some nature a Ford product; Some may have resulted by a combination of factors including the David v. Goliath reluctance of a smaller company to tackle an industrial giant in litigation to protect the smaller company's own goodwill it is developing for its products.

Regardless of one or more joint usages, which (unless Ford is to admit caused it to deliberately adopt Westward's trademark) Ford's lawyers have now resurrected but which Ford may never have previously considered, two things are most significant: Those joint usages have *not prevented confusion here*, which is the ultimate issue; and Westward is not bound by any free-ride morals of others or other factors which may be the reasons such *other* joint usages co-exist.

6. Supposed-Defense that "Mustang" is a Trademark Used by Others:

The "third party use" argument by Ford includes even uses which Ford admits began *after* Ford's "Mustang" use commenced. Quite obviously, if relevant at all, such later uses *aggravate* rather than excuse Ford's conduct. And as to the pre-Ford and pre-Westward uses, even those in the general automotive field, it is only the specific Westward and Ford products here involved which are both overall-type pleasure vehicles for highway use. These and other reasons showing Ford's "third party use" argument to be non-determinitive to prevent protectability against a use such as Ford's, which does create likely and actual confusion, have been already presented in our petition for certiorari, pages 15 through 17.

7. Supposed-Defense that Indiana Law Has Been Correctly Announced and Applied by the Appellate Court:

This supposed defense is answered by each section of our petition, pages 8 through 20. We of course do not deny that there have been a few Indiana cases involving trademark questions; but, as did the Appellate Court, we point out that the Indiana cases are quite sparse, and that they do not limit protectability. Thus, in the absence of any articulation of Indiana law on the precise point, we are *not* seeking this Court to *change* the Indiana law; rather, we are seeking an *articulation* of common law on a precise point which has not been articulated by Indiana. And, as explained in our petition itself, that articulation involves substantive and basic general principles and rationales of trademark protection as generally understood, not only of Indiana.

8. Ford's Assertion that White Motor Company Somehow Provides for Ford a Hostage Shield:

As a part of a settlement as to registrability (not infringement) with White Motor Company, Westward of course willingly stipulated that Westward would not commence to manufacture and sell any future "Mustang" product which would be apt to be, in the eyes of the purchasing public, confusingly similar as to source or origin with any product of White, it being tacitly understood and unchallenged that Westward's present product line of trailers and campers would not likely cause such confusion. This agreement is saying, as to purposes here at all relevant, no more than that Westward will of course obey the generally accepted (and here advocated by Westward) substantive trademark law by not creating affiliation-confusion.

Further, it should be noted that White has never marketed a sports automobile trademarked "Mustang," which is the specific Ford product which has caused the affiliation-confusion against which protection is here sought. Moreover, there has never been any confusion, likely or actual, and White has never asserted any, between White's "Mustang"-marked products, which are truck-*components*, and Westward's trailers and campers, which are precisely the Westward products which it seeks here to protect. (Respondent's assertion, p. 19, that White's opposition alleged a confusion by Westward's *use* is wrong, as Ford knows; for White's opposition was to Westward's *registration* rather than to its *use*. And there are several confusion-lessening differences in the White and Westward matter than in this Westward and Ford controversy.)

Thus the White matter can be no defense to Ford, whose Ford products, rather than White's, are confusingly re-

lated to Westward's; and the very assertion of White by Ford, as an attempted defense hostage, shows again that Ford consistently attempts to avoid the ultimacy of the criteria of confusion-likelihood, which is present as between the Westward and Ford products here in issue, and is *not* present between Westward and White.

9. Supposed-Defense that Ford Avoids Confusion of Certain Specific Types, Although Not All Types:

Ford self-righteously proclaims that it avoids *certain* ones of confusion-types, such as by carefully marking its products and warranties as being of Ford. But this merely clouds the issue as to the basic and general confusion *here* present (a "reverse" confusion mistake of the public that Westward is a Ford affiliate). All possible self-marking by Ford, and all possible avoidance by Ford of palming off or of taking a free ride on Westward, *do not at all* detract from the "reverse" confusion here likely and actual; all possible careful Ford-labelling, instead, probably *increases* rather than decreases the chance of the "reverse confusion" which is precisely the very type of harmful confusion basic to this case.

(If it be viewed as an anomaly or contradiction, that careful truthful labelling can *add* to public confusion as to source-affiliation, that gives another reason why this Court should look into this basic matter of trademark protection, by granting certiorari. Actually, the apparent anomaly is easily understood as being another example of the fact that a use of an identical term in this closely-related a use cannot be condoned; for careful marking cannot always prevent even the usual trademark confusion *of* the second-user being an affiliate of the earlier-user, and thus it is no wonder that careful marking cannot prevent the "reverse" confusion of the type here basically present.)

But regardless of how rationalized, and even if seen to present an anomaly, the Ford-labelling has *not* prevented the likely and actual confusion of the specific "reverse" type *basic to this case*; and thus Ford's careful labelling and avoidance of palming off, free-ride, and other aspects mentioned as present in many other cases, cannot be a bar to the protection Westward seeks as to its own products. *"Reverse" confusion is not and cannot be avoided by the second-user's careful self-labelling.*

10. Supposed-Defense of Ford's Assertion that Westward's Damage Was Only of a Technical or Non-demonstrable Nature:

This supposed-defense is fully answerable merely by our pointing out that no actual confusion nor examples of actual damage need be shown as a pre-requisite to protecting a trademark against confusion, and particularly not at the summary judgment level here present.

But if the Court nonetheless is curious about the matter of actual damages in view of any supposition that Ford's use would benefit Westward, or in view of Ford's assertions that it did, we point out that Ford's rationalization overlooks several significant facts: (a) The 1965 Westward business downfall and bankruptcy was the result of loss of sales preditions on Westward's more profitable line, which necessitated money-losing steps to bolster sales, which, even though several factors contributed to a 1965 increase in sales quantities, worsened the profit picture (as Ford's asserted values clearly show) to an unendurable condition in contrast to a profit-and-loss sheet which in the early or pre-Ford years had been quite acceptable, considering the single-family ownership and salaries taken and advertising and other promotional investments for the future; (b) Westward was and has been frantically strug-

gling to survive yet rightfully maintain its "Mustang" goodwill, rather than build up law suit statistics which could be analyzed in the superficial manner Ford advocates, Ford's manner not taking sufficiently into account accumulative hardship and effect of the other factors here summarized; (c) The trademark "Mustang," rather than the Westward model names, had always been the basic trademark of Westward's prestige line, and was the Westward trademark to which a most substantial portion of its advertising and invested goodwill was tied; (d) The years 1964 and 1965 were good sales years for recreational vehicles generally, and thus much of the 1964 and 1965 sales may be accounted for by the generally-prevailing good sales and by the previous goodwill built by Westward's previous use and advertising; (e) A quadrupling of Westward's facilities had been started in the winter of 1963, this capacity accounting for some of the boost in 1964 and 1965 sales which formerly would have been turned away; and, being but one of a series of theretofore-successful expansions by Westward, indicates the reasonableness of Westward's 1964 and 1965 forecasts; (f) Not only the Enochs administration of Westward failed after Ford began its infringement, but successively two other administrations have failed, attempting to carry on the "Mustang" line. (The very deposition cited by the respondent as recently filed in the District Court, being by a present owner of Westward, states that the name "Mustang" "*doesn't sell trailers*" even though "people *say* it is a fine name," and that the Ford-confusion is a factor in Westward's current financial hardship, which the same owner has subsequently re-affirmed, by affidavit also filed with that Court, as being now increasingly desperate.)

Ford with apparent egotism cannot bring itself to believe Westward's damage, just as most all egotistical trademark

infringers cannot seem to believe they will hurt the earlier user; but the allegations of Westward's damage are tragically true nonetheless.

Ford's egotistical boasting of its "Mustang" popularity as contest prizes illustrates Ford's fallacy and lack of self-criticism in evaluating statistics; for quite obviously, a Cadillac would be more appreciated than a "Mustang," by many, if it did not cost the contest-sponsors too much to offer Cadillacs. Viewed in this light, the Ford method of statistical analysis is seen to be quite questionable; for, considering the above factor, the high rate of Ford "Mustangs" as contest give-aways really *just means that they are a lot cheaper than Cadillacs.*

Much more proof will be provided on actual damages when the time comes.

11. Supposed-Defense that Ford's Infringement was not Specifically Stressed in the Bankruptcy Proceedings in 1966:

At the time of the January, 1966, bankruptcy proceeding, Mr. Enochs had not yet obtained the documented evidence, which he now has, to prove to the creditors his view that Ford was the significant cause of Westward's progressively worsening financial condition. He knew his trademark counsel had not been able to find any case which clearly and unequivocably mentioned "reverse" confusion as being a wrongful creation legally. All the creditors present already knew of this suit against Ford (it had just been mentioned in the bankruptcy testimony, as well as previously), and thus he knew that they already knew he personally felt that Ford was the significant cause. Making matters worse, he knew that the creditors and others had repeatedly echoed the suspicions and accusa-

tions he had endured from Ford's attorneys in oral deposition and written discovery matters, to the general effect that he was not believed in his assertions of a Ford-caused harm. Whatever their reasons, such as the false notion that "any publicity is good publicity" or the false notion that a mistaken Ford-affiliation would automatically be a blessing to Westward, he knew that the creditors in a dismal bankruptcy scene had not believed him and would not believe him as to the Ford-relation of his company's difficulties. He knew his trademark counsel was not present.

With that situation in mind, Mr. Enochs no doubt realized that for him to then again assert the blame to be Ford's would have necessitated him to have, singlehandedly, litigated this entire trademark suit *in and as an incident to the bankruptcy*. So, without lieing, he did avoid extra references to Ford which were not directly pressed or pursued in the questioning, mentioning in that portion of the testimony only other factors, and letting his reason of low sales prices not again explained by his known view that the Ford-confusion was a major part of the buyer-reluctance which meant Westward's sales price did not support his extra-effort steps which worsened his profit picture. *Ford should be ashamed that it even tries to make anything out his woeful plight on that humiliating day of gloom*, which the subsequently-obtained and subsequently-evaluated evidence has proven to have been Ford's fault.

But be that as it may, there never before has been any rule that an infringement would have to actually be a cause of an actual bankruptcy for it to be at all actionable; and Ford's assertion relating to the bankruptcy causes, at the summary judgment level, shows once again that Ford is trying desperately to avoid the ultimate issue of confusion-likelihood as controlling here.

12. Supposed-Defense that Westward's Mr. Rizzo Had, During the Continuance of the Ford Infringement, Sought Co-operation with Ford as a Possible Means to Offset the Harm of the Infringement:

Mr. Rizzo, long *after* Ford's infringement began, and in an effort to boost Westward's lagging sales, truly did attempt to interest Ford in a joint promotion; but the plan was consistently vetoed by Westward's top administration, and was never consumated. (Mr. Rizzo was a relatively new man at Westward at the time, and had not known personally the pre-Ford promising growth of the Westward business. In contrast, the Westward top administration which had controlled Westward in its pre-Ford years of promising growth felt strongly even then that the Ford confusion was the cause of Westward's lagging sales after the Ford entry.)

Even so, any such duress co-operation would not have been an escape for Ford altogether, as Ford tries to assert, *any more than it would destroy actionability for a drowning man to reach up for help from the hand of the very man who pushed him in the lake.* Moreover, particularly considering the duress conditions of lagging sales, it does not negate a confusion-likelihood, which is the basic issue here.

13. Ford's Assertion that Westward's Inquiry to its Dealers was Biased:

The inquiry, which produced the confusion-relating affidavits such as set forth in our petition appendix (p. 74 through 77), was *not* biased. As this Court will hopefully note for itself, by reading the response affidavits there set forth, and the inquiry material quoted in respondent's appendix (p. 2-6), the inquiry can even *appear* to be biased only because the facts of this case do *truthfully* favor

Westward's rightful protectability. Moreover, the inquiry sought and obtained the dealers' *own words*, in the sworn affidavits, clearly sufficient at this summary judgment level.

And be that as it may, the widely prevailing rule is that there is no need for any showing of actual confusion at all, particularly at the summary judgment level, where confusion is otherwise shown to be even likely, as clearly is the situation here, as summarized in our petition, page 6.

14. Ford's Assertion that Westward's Federal Registration is To Be Here Ignored:

Westward's federal registration is a fact, and in a real sense its issuance specifically brings with it an express protectability-standard which ought to have some significance in considering two nation-wide trademark uses, particularly where neither Indiana nor other jurisdictions have articulated on the precise point of *protectability against reverse confusion* which is the basic and controlling issue here.

Moreover, Ford has not changed its operations, in respects here relevant, at all since the Westward registration issued; that is, Ford is presently flaunting Westward's federal registration in substantially the same manner as it flaunted Westward's common law protectability. Thus realistically considering the matter, Ford can scarcely assert that the express protectability-standard of Westward's federal registration should make any objectionable difference.

Further, there is no valid reason (as discussed in the petition for certiorari itself) why the more expressly-broad protectability-standard of the federal staute should not be looked to in articulating the common law on a novel

point, particularly where interstate usage is clearly involved.

And as a practical matter to avoid needless extra litigation, this Court is implored to state its views, as a part of *this phase* of the case, as to the protectability against "reverse" confusion of a federally registered trademark.

For example, in spite of all our arguments as to the logical reasons why "reverse" confusion should be recognized as a type against which protection should be provided, if this Court does not feel that "reverse" confusion of even a federally registered mark is protectable against, this Court should please say so as a part of this present phase of this controversy. A mere denial of certiorari will leave this important aspect of trademark law in the air; and will be of even more damage to nationwide business planning than merely a sanction of its denial to a common law trademark.

C.

CONCLUSION

Apology is again made to the Court for our dwelling here on the various main defenses offered by respondent; for generally those defenses do not relate to the ultimacy of the basic criteria of confusion-likelihood, and generally they attempt to avoid the main issue here: The protectability of a valid trademark for one's own goods, against the likely and actual "reverse confusion," here caused by a forewarned corporate giant who has recklessly and ruthlessly harmed a smaller company.

Since confusion-likelihood and protectability against "reverse" confusion are the main and controlling issues here, only summary-type argument has been given here

to the main defenses asserted by Ford. More complete answer to those and the other asserted defenses will be given in the briefs and hearing on the merits. We have shown that Ford's charges of lieing or misleading are without merit; and others are as to non-relevant points and thus are not bothered here to be specifically refuted; although we deny them.

But again we point out now, all the Ford defenses altogether do not negate the likelihood and actuality of goodwill-prejudicing affiliation-confusion, nor do they show why "reverse" confusion should not be recognized as a type against which a valid trademark use should be protected. These are the key and over-riding issues. All of the supposed-defenses and defense assertions are snbordinate to the confusion-likelihood issue; and since none of them can un-do the confusion likelihood and actuality here strongly shown, it seems imperative for this Court to speak out as to the protectability against "reverse confusion."

In summary, we point out that we have here and in our petition presented sufficient answer to Ford's supposed-defenses; and all of Ford's defenses simply do not refute the petition for certiorari itself. (In capsule form, the general non-relevance of respondent's entire brief may be amazingly observed and confirmed merely by looking at its Index; and, in fact, although the respondent's brief talks *around and about* the general subject matter of the petition, *it does not refute it at all.*) The Appellate decision cannot be left uncorrected, nor at least unheard more fully on the merits by this Court.

It is respectfully urged that certiorari be granted, for one or more of the several important reasons detailed in

our petition for certiorari, and which respondents have wholly failed to refute.

Respectfully submitted,

JOHN P. PRICE,
515 Circle Tower Building,
Indianapolis, Indiana 46204

Attorney for Petitioners.

Of Counsel:

ROBERT A. SPRAY,
3675 North Post Road - Suite No. 3,
Indianapolis, Indiana 46226